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Nos. 84-693 and 84-5748

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In the Supreme Court of the United States

OCTOBER TERM, 1984

WILSON TONY HARRELL, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant who is convicted by a general verdict on one count of conspiring to distribute cocaine and other controlled substances, in violation of 21 U.S.C. 841(a) and 846, may be sentenced to the more severe penalty authorized where the object of the conspiracy is distribution of cocaine, rather than only to the lesser penalty for conspiracy to distribute the other controlled substances.

2. Whether a conviction on one charge may be affirmed in part on the basis of evidence related to other charges upon which the defendant has been acquitted.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 737 F.2d 971.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1984. A petition for rehearing by petitioner Hawkins was denied on September 21, 1984. The petition for a writ of certiorari in No. 84-693 was filed on September 27, 1984; the petition in No. 84-5748 was filed on November 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted on one count of conspiracy to possess with intent to distribute several controlled substances, in violation of 21 U.S.C. 846 (Count One); one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count Two); and one Travel Act count, in violation of 18 U.S.C. 1952 (Count Three). Petitioner Hawkins also was convicted on an additional count of possession of cocaine with intent to distribute (Count Six).[1] Petitioner Harrell was sentenced to 15 years' incarceration on Count One, 15 years' incarceration followed by a 10-year special parole term on Count Two, and five years' incarceration on Count Three, the sentences to run consecutively. Petitioner Hawkins was given concurrent sentences of 15 years' incarceration on Counts One and Two, to be followed by consecutive sentences of five and 15 years' incarceration on Counts Three and Six, respectively. He also received 10-year special parole terms on Counts Two and Six. The court of appeals reversed Hawkins' conviction on Count Three; it affirmed petitioners' other convictions, as well as their sentences. Pet. App. A1-A36.[2]

The evidence at trial established that petitioners operated a far-flung drug distribution ring involving cocaine and other controlled substances (Pet. App. A2). As one part of this enterprise, one of petitioners' couriers made several trips from Florida to Oklahoma City in early 1980 to distribute drugs (*id.* at A29). Later that year, Hawkins drove the courier to Detroit to sell cocaine and quaaludes (*id.* at

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[1]Both petitioners were acquitted on Count Four, which charged possession with intent to distribute methaqualone, and on Count Five, another Travel Act count.

[2]"Pet. App." refers to the appendix to petition, No. 84-693.

A30, A33). At the close of trial, the district judge instructed the jury on the conspiracy count that it is "unlawful for any person to knowingly and willfully possess the substances Methaqualone, Amphetamine, Methamphetamine, or Cocaine with intent to distribute" (84-693 Pet. 5). The jury returned a general guilty verdict on the conspiracy count, as well as on several substantive counts.

On appeal, the Eleventh Circuit rejected Hawkins' challenge to his conviction on Count Two, which charged possession of cocaine with intent to distribute "[i]n or about February 1980" (Pet. App. A33). The court found that Hawkins had possessed cocaine when he drove the courier to Detroit in the summer of 1980, and it concluded that the variance between the date in the indictment and the date proved at trial did not "subject[] Hawkins to undue surprise or expose[] him to the possibility of a second prosecution for the same offense" (*id.* at A33-A34).[3] The court of appeals also rejected both petitioners' arguments that they should not have been sentenced under the statutory provisions directed at conspiracy to traffic in cocaine (21 U.S.C. 841(b)(1)(A)). Petitioners argued that Count One of the indictment charged conspiracy to distribute several types of controlled substances, so that the jurors might have voted to convict without specifically finding that petitioners conspired to traffic in cocaine. But the court of appeals noted that petitioners had failed to object to the form of the indictment or to the jury instructions, and had not requested a special verdict. Because the sentencing issue had not been properly preserved, the court held that reversal was not warranted (Pet. App. A35-A36).

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[3]The court overturned Hawkins' conviction on Count Three, which was grounded on the courier's trips to Oklahoma City, because it found that Hawkins did not join the distribution ring until after that distribution (Pet. App. A30-A32).

ARGUMENT

1. In this Court, petitioners again challenge the sentences imposed under Count One. They base their arguments on the penalty provisions of 21 U.S.C. 841, which set forth the sanctions for violations of 21 U.S.C. 846. Section 841(b)(1)(A) sets the maximum sentence for a conviction involving cocaine at 15 years' imprisonment and a $25,000 fine. But Section 841(b)(1)(B) sets a maximum sentence of only five years' imprisonment and a $15,000 fine for trafficking in methaqualone, amphetamine, and methamphetamine — the other drugs listed in Count One of petitioners' indictment. Because the district court framed its instructions in the disjunctive and the jury returned a general verdict, petitioners assert that the jury may have believed them to be guilty of conspiring to distribute only controlled substances other than cocaine. Hypothesizing this possibility, they contend that the district court could not lawfully have imposed sentences in excess of those authorized by Section 841(b)(1)(B) on the basis of such a verdict.[4]

This contention, which in the abstract is identical to the argument raised in the petition for certiorari in *Beasley* v. *United States,* cert. denied, No. 84-409 (Jan. 21, 1985), misapprehends the nature of 21 U.S.C. 841. As we explained in our brief in opposition in *Beasley* (at 5-8), a copy of which is being served on petitioners' counsel, the language, structure and legislative history of the statute suggest that the type of controlled substance distributed by the defendant is not one of the elements of a Section 841 offense that must be

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[4]This contention, if meritorious, would nevertheless not affect the sentence imposed upon petitioner Hawkins unless he also succeeds in his attack upon his conviction on Count 2. The claim affects the validity of the sentence only on Count 1, but Hawkins received an equal and concurrent sentence on Count Two for possession, specifically, of cocaine.

found by the jury. Instead, the elements for jury determination are described in Section 841(a), which in relevant part makes it a crime simply to "possess with intent to * * * distribute * * * a controlled substance." Section 841(b) then sets out the sanctions to be applied by the district court when an offense of the type described in Section 841(a) has been proved; it establishes the range of penalties that may be imposed for trafficking in various types of controlled substances. The nature of the substance involved therefore is relevant only to the trial judge's sentencing determination.[5]

While petitioners maintain that a conflict among the circuits exists on this point, they have failed to demonstrate that their conspiracy sentences would have been found improper by *any* court of appeals. For example, in *United States* v. *Orozco-Prada*, 732 F.2d 1076 (2d Cir. 1984), upon which petitioners principally rely (84-693 Pet. 15-18; 84-5748 Pet. 5), the Second Circuit held it improper to sentence a defendant under Section 841(b)(1)(A) for participation in a cocaine-related conspiracy when the indictment charged a conspiracy to distribute both marijuana and cocaine, and the jury returned a general verdict. 732 F.2d at 1083-1084. But the court of appeals expressly noted that its conclusion might have been different had the defendant "also [been] convicted of substantive drug offenses carrying fifteen-year sentences," because had " 'the jury convicted defendant of the [substantive] offenses . . . that [are] the object[] of the

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[5]This conclusion is consistent with the uniform holdings of the courts of appeals that a defendant need not know the precise nature of the drug he possesses to violate Section 841(a)(1), which refers only to "a controlled substance." *E.g.*, *United States* v. *Lopez-Martinez*, 725 F.2d 471, 472-475 (9th Cir. 1984), cert. denied, No. 83-6565 (Oct. 1, 1984); *United States* v. *Berwick*, 710 F.2d 1035, 1040 (5th Cir. 1983); *United States* v. *Lewis*, 676 F.2d 508, 512 (11th Cir. 1982); *United States* v. *Morales*, 577 F.2d 769, 776 (2d Cir. 1978).

alleged conspiracy, it [would have been] reasonable to conclude that the jury found defendant guilty of a conspiracy to commit [those] substantive offenses.' " *Id.* at 1084, quoting *United States* v. *Peters,* 617 F.2d 503, 506 (7th Cir. 1980).

The petitioners here fall squarely within this exception. Both were convicted on substantive counts of possession of cocaine with intent to distribute. This conduct, of course, was one of the objects of the conspiracy charged in Count One of the indictment. The Second Circuit therefore presumably would have " 'conclude[d] that the jury [had] found [petitioners] guilty of a conspiracy to commit [that] substantive offense[]' " (732 F.2d at 1084, quoting *Peters,* 617 F.2d at 506), and consequently would have affirmed their sentences. Petitioners' claim likewise would have been unsuccessful in the Tenth Circuit, which has held that the factors set out in Section 841(b) are relevant only to sentencing proceedings. *United States* v. *Dickey,* 736 F.2d 571 (10th Cir. 1984), cert. denied, No. 84-409 (Jan. 21, 1985).[6]

In any event, it would be premature for this Court to reconcile any arguable inconsistency between the views of the Eleventh Circuit and those of other courts of appeals on this issue. As we noted in *Beasley* (Br. in Op. 8 n.8), the Eleventh Circuit has addressed the nature of Section 841 in three recent decisions. In *United States* v. *Simmons,* 725 F.2d 641, 643-644 (11th Cir. 1984), cert. denied, No. 83-1942 (Oct. 1, 1984), the court of appeals stated that the factors set out in Section 841(b) are "applicable only to the

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[6]The other purportedly conflicting decisions cited by petitioners — *United States* v. *Quicksey,* 525 F.2d 337 (4th Cir. 1975), cert. denied, 423 U.S. 1087 (1976), and *Brown* v. *United States,* 299 F.2d 438 (D.C. Cir.), cert. denied, 370 U.S. 946 (1962) — are not on point. Neither case involved an indictment charging conspiracy to traffic in two different types of controlled substances; as a result, neither addressed the language or legislative history of Section 841.

sentencing phase." In *United States* v. *Alvarez*, 735 F.2d 461 (11th Cir. 1984), the court held that, when an indictment charges a conspiracy to distribute both cocaine and marijuana, the return of a general guilty verdict does not authorize imposition of an enhanced sentence. And in this case the court of appeals took a third course, holding in similar circumstances that reduction of a defendant's sentence is inappropriate when the defendant fails to complain about the form of the indictment or to request a special verdict at trial. These cases were decided virtually contemporaneously with each other, though none cites or discusses the others. It therefore would be appropriate for this Court to allow the Eleventh Circuit to formulate a settled rule on when enhanced penalties may be awarded under Section 841 before determining whether its rule creates a conflict requiring further review.[7]

2. Petitioner Hawkins also asserts that the court of appeals should have overturned his conviction on Count Two for insufficient evidence. He notes that the jury acquitted him on Counts Four and Five, which involved his trip to Detroit in the summer of 1980. He therefore maintains that the court of appeals erred in relying on evidence relating to the Detroit transaction in upholding his conviction under Count Two. This argument is without merit.

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[7]Indeed, even if the Court were to conclude that review of the sentencing issue otherwise would be warranted, this case presents a particularly poor vehicle with which to address the question. Because the court of appeals concluded that petitioners had failed to preserve their sentencing objections, it did not discuss the meaning of Section 841. Review of the issue would be more appropriate in a case in which the question had been properly presented and fully considered by the court of appeals, and in which the jury's verdicts on other counts do not confirm that its guilty verdict on the conspiracy charge reflected a finding that supports the greater sentence.

Count Four of the indictment simply alleged that, while in Tampa, Florida during the summer of 1980, Hawkins possessed methaqualone with the intent to distribute it. Count Five alleged that Hawkins traveled to Detroit to establish a business enterprise involving controlled substances. The jury's acquittal of Hawkins on these two charges says nothing about its views on Count Two, which alleged that, while in Tampa "[i]n or about February, 1980," Hawkins possessed cocaine with intent to distribute it. The court of appeals therefore could properly have considered evidence relating to the Detroit trip, as well as other evidence in the record (see Tr. 256, 456-460, 469-470, 577, 585), in concluding that a rational trier of fact could have found that Hawkins possessed cocaine in Tampa. See *Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979). And even if the verdicts were factually inconsistent, that would afford no ground for relief. *United States* v. *Powell,* No. 83-1307 (Dec. 10, 1984).[8] In any event, this factual issue does not warrant further review.

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[8]Similarly, Hawkins is incorrect in contending (84-5748, Pet. 7) that the court was required to overturn his conviction on Count Two once it had decided to vacate his conviction on Count Three. While the court found insufficient evidence to prove that Hawkins was participating in a criminal enterprise in February 1980, Hawkins has offered no reason to believe that he was prejudiced by the variance between the date set out in Count Two ("[i]n or about February") and the court of appeals' finding that he possessed cocaine in the summer of 1980.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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